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Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AND THE UNION OF AMERICAN HEBREW CONGREGATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. It has taken a particular interest in the separation of church and state, believing that the Establishment Clause of the First Amendment must be given a broad and generous reading in order to protect religious liberty.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is

essential to religious liberty for all Americans. The BJC's members include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Union of American Hebrew Congregations (UAHC) is the congregational arm of the Reform Jewry, comprising 850

synagogues with a membership of over 1.5 million Jews in the United States. For over the one hundred years of its existence, the UAHC has been a passionate advocate for protecting and strengthening the religion clauses of the First Amendment as the indispensable tools for preserving religious liberty. It has long held that vigorous enforcement of the Establishment Clause is the most effective method for ensuring that religion can flourish free of government control and regulation.

Amici believes that separating church and state, including a ban on government funding for religion, is as an indispensable element of religious liberty as is protecting religious practice from governmental interference. To this end they have opposed schemes to provide aid to parochial schools.

But like any constitutional principle, the principle of separation of church and state can be carried too far. When that happens, the Establishment Clause ceases to protect religious liberty and begins to impede it. The decision below falls into the category of too much of a good thing and hence unnecessarily penalizes a child exercising his right to attend a parochial school.

The letters consenting to the filing of this brief *amici curiae* are on file with the Clerk of this Court.

STATEMENT OF THE CASE

The description of the proceedings below are not in dispute. The *amici* respectfully refer the Court to the respective statements of the case of the Petitioners and Respondent.

STATEMENT OF THE FACTS

The facts are not in dispute. The *amici* respectfully refer the Court to the respective statements of fact of the Petitioners and Respondent.

I. THE ONLY ISSUE THE COURT NEEDS TO DECIDE IS THAT THE ESTABLISHMENT CLAUSE, AS CONSTRUED IN *LEMON* v. *KURTZMAN* AND ITS PROGENY DOES NOT BAR PROVIDING ZOBREST AN INTERPRETER

But for the Establishment Clause, James Zobrest ("Zobrest"), who has been profoundly deaf since birth, would have had a certified interpreter assigned to accompany him to his classes and communicate his teachers' and classmates' words to him and his thoughts to them.[1] The courts below, as a well as the Arizona Attorney General in a formal opinion, found that because Zobrest attended a parochial school he was constitutionally barred from receiving assistance indispensable to his education.

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1. In its opposition to the Petition for *Certiorari* at 12-13. Respondent contends that as a statutory and regulatory matter, Zobrest is not entitled to a sign language interpreter in a parochial school. That contention was not pressed below. *Amici* accordingly do not address it here.

With the dissent below, we believe that these authorities have misconceived the scope, reach and meaning of existing case law construing the Establishment Clause. This Court need go no further than to correct their errors in interpreting the corpus of law in this area to correct the injustice suffered by Zobrest. *A fortiori*, this Court should not disturb the fundamental underlying principle of government neutrality toward religion embedded in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1977). Such neutrality is, as this Court has repeatedly instructed from the beginning, indispensable to religious liberty.

Thirty years ago, Justice Goldberg, joining in a decision banning religious exercises in the public schools warned that an

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that non-interference and non-involvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, even active, hostility to the religious. Such results are not only not compelled by the Constitution, but it seems to me, are prohibited by it.

School District of Abington Township v. *Schempp*, 374 U.S. 201, 306 (1963). (emphasis added)

Justice Goldberg provided no simple test which would enable courts to avoid the very overzealousness against which he warned so passionately. On the contrary, he admitted that there was "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible." *Id.* Recognition of the inherent and unavoidable complexity of the

Establishment Clause has become commonplace. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *PEARL v. Regan*, 444 U.S. 646 (1980).

Short of abandoning the enterprise altogether, then, there is no alternative but to grapple with difficult marginal cases and run the risk that in some cases judges will, as happened here, apply the Establishment Clause improperly.

This problem of difficult cases at the margin is not limited to the Establishment Clause. It is equally true of the Fourth Amendment, the Double Jeopardy Clause, and the Confrontation Clause. Difficult cases are, moreover, not limited to constitutional cases. Such cases are equally likely under the Bankruptcy Code and the Tax Code as well.

It is inevitable that cases at the margin will sometimes be wrongly decided,

no matter where the margin is. It hardly follows that the possibility of error is reason for discarding a well settled rule of law because in some such marginal case some judge or judges produce a misapplication leading to an improper or incorrect result.

Those who follow this Court's decisions in even the most cursory fashion know that, complaining in large part of its complexity, several members of the Court have expressed a willingness to jettison, modify or limit the existing standards of *Lemon* v. *Kurtzman* for adjudicating cases arising under the Establishment Clause.[2] *Lee* v. *Weisman*,

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2. That test has been explicated and elaborated in numerous decisions of this Court. *See*, e.g., *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Stone* v. *Graham*, 449 U.S. 39 (1980); *PEARL* v. *Regan*, 444 U.S. 646 (1980); *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Lynch* v. *Donnelly*, 465 U.S. 688 (1984); *Aguilar* v. *Felton*, 473 U.S. 402 (1985); *Estate of*
(continued...)

112 S.Ct. 2649 (1992) (Scalia, J., dissenting); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting). Any decision to repudiate *Lemon* in this case would have a substantial impact on the law, over and above the bare fact of the overruling in one fell swoop of numerous decisions of this Court.

Literally hundreds of federal and state court decisions apply the *Lemon* principles to a myriad fact patterns -- some predictable, some not. The decided cases are but a small fraction of the impact of *Lemon* on the law in this area.

2.(...continued)
Thornton v. *Caldor, Inc.*, 472 U.S. 703 (1985); *Grand Rapids City School District* v. *Ball*, 473 U.S. 373 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Edwards* v. *Aguillard*, 482 U.S. 378 (1987); *Bowen* v. *Kendrick*, 487 U.S. 589 (1988); *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Texas Monthly Inc.* v. *Bullock*, 489 U.S. 1 (1989); *PEARL* v. *Nyquist*, 413 U.S. 756 (1973).

There are settled administrative and political understandings of *Lemon* and its progeny, understandings which govern the day-to-day operation of many governmental agencies, including the public schools, social welfare agencies, park authorities, the military and taxing authorities, to name but a few. All of these understandings would be cast into doubt by a repudiation of *Lemon*, no matter how carefully crafted an opinion overruling *Lemon* might be.

Overruling *Lemon* would not simply excise from the law whatever untoward aspects of *Lemon* the Court might identify in the way a micro-surgeon uses lasers to excise unwanted growths. Because the *Lemon* test has become so entrenched, and is so much a part of the warp and woof of the law in this area. *Lemon* cannot be abandoned without unsettling literally

every other decision in this area, whether the Court intends that result or not.

We do not say that *Lemon* can or should never be reexamined -- although we believe that decision to be fundamentally sound -- but that the Court should do so only where a case would be decided one way under the *Lemon* test and some other way under another test. In other words, consideration of whether to overrule a case of the significance and import of *Lemon* should be avoided except in a case in which the viability of *Lemon* is outcome determinative.

This is not a novel suggestion. This Court has long recognized that Constitutional adjudication is governed by a rule of strict necessity. As Justice Brandeis explained in his authoritative catalog of principles of constitutional adjudication, "[t]he Court will not formulate a rule of

constitutional law — broader than is required by the precise facts to which it is to be applied." *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347 (1936), cited in, *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 525-526 (1989) (O'Connor, J., concurring); *Regents* v. *Ewing*, 474 U.S. 214, 222 (1985).

A rule of necessity ought especially to govern whether the Court overrules prior cases in those instances in which the case under consideration is not a relic of the law. A re-examination of an existing constitutional standard is appropriate where the rule has become a lifeless hulk, because of some other caselaw or statutory developments. *Lemon*, by contrast, has been and is an integral

part of the law for three decades or more.[3] Whether *Lemon* is, or ought to continue to be, authoritative, and what impact *stare decisis* ought to have on that decision, *Compare*, *Casey* v. *Planned Parenthood*, 112 S.Ct. 2791 (1992) and *Patterson* v. *McClean Credit Union*, 491 U.S. 164 (1989) with *Payne* v. *Tennessee*, 501 U.S. _____ (1991), are questions which may have to be addressed some day, but not now and not in this case.

A decision overruling *Lemon* is far broader than is required by the precise

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3. *Lemon* itself did not create the three part test out of whole cloth. Instead, the three part test was presented by this Court as a distillation of the teachings of its prior cases going back to *Everson* v. *New Jersey*, 330 U. S. 1 (1947) and *McCollum* v. *Bd. of Ed.*, 333 U.S. 203 (1948). It is not surprising that critics of *Lemon* v. *Kurtzman* do not begin their criticism of the Court's work with that case, but with its earlier decisions. *See, e.g.*, R.L. Cord, Separation of Church and State: Historical Fact and Current Fiction (1982). Thus, the attack on *Lemon* is a convenient mask for an attack on a half century of decisions by this Court.

facts to which it is to be applied because the provision of a sign language interpreter does not violate the Establishment Clause as interpreted employing the *Lemon* criteria. We believe, with the dissent below, that the proper application of *Lemon* and its progeny, including Justice Marshall's opinion in *Witters* v. *Washington*, 474 U.S. 481 (1986), compel the conclusion that if Arizona were to provide Zobrest with a sign language interpreter, it would not violate the Establishment Clause. This is a sufficient holding to dispose of this case.

II. THE AID AT ISSUE HERE POSES NO THREAT TO THE INSTITUTIONAL SEPARATION INTENDED BY THE ESTABLISHMENT CLAUSE

In evaluating Zobrest's challenge to the decision below, it is important to keep in mind the underlying purposes of

the Establishment Clause. Most of the provisions of the Bill of Rights act as a direct buffer between the government and its citizens. That is to say, they regulate directly the actions of government as they intrude upon the life of the citizen.

The right to freedom of speech, the right to petition for redress of grievance, and the right to be free of unlawful searches and seizures, and the various trial rights of the criminal defendants embodied in the Bill of Rights operate in precisely this way. A major component of the Establishment Clause operates in the same way by barring government from coercing participation in religious exercises. *Lee* v. *Weisman*, 112 S.Ct. 2649 (1992); *Westside Board of Education* v. *Mergens*, 496 U.S. 226 (1990).

The *Lemon* test extends the Establishment Clause beyond the problem of direct coercion to structure the relationships between religion and government. Viewed this way, the Establishment Clause is not only a guarantee of individual liberty, but also a principle of political organization.

The Court has understood the Establishment Clause in this way because it has found, correctly in our view, that maintaining government neutrality in matters of religion was for the founding generation an indispensable element of religious liberty. This was so for two distinct reasons.

State sponsorship of religion was thought to corrupt religion, a point emphasized in the colonial era by the influential Roger Williams, M. DeWolf Howe, The Garden and the Wilderness (1965)

and borne out then and now by experience. On the other hand, insinuating religion into governmental functions necessarily diminishes the liberty of those who do not share the religious views of those who have captured the mechanisms of government to their own theological advantage or those who wish their religious behavior and belief to be the product of their own religious choices, not a response to secular power, points emphasized by James Madison in his seminal Memorial and Remonstrance.

In *Larkin* v. *Grendel's Den*, 459 U.S. 116, 126 (1982) this Court quoted *Lemon*, 403 U.S. at 614, for the broad and general proposition that "[t]he objective [of the Establishment Clause] is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other". The Court went on to observe

that this was not a rule enunciated for the first time in *Lemon* but was of lengthy and distinguished ancestry:

> The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority. *Watson* v. *Jones*, 13 Wall. 679 730, 20 L.Ed. 666 (1872), quoting *Harmon* v. *Dreher*, 1 Speers Eq. 87,120 (S.C.App. 1843).

> As these and other cases make clear, the core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions." [citations omitted]

In *Grand Rapids City School District* v. *Ball*, 473 U.S. 373 (1985), the Court applied *Lemon*'s three-part test to invalidate a system of providing aid to parochial schools in the form of public school teachers to provide remedial instruction. In that case, this Court

began its discussion of *Lemon* by putting the test into a political and institutional context by describing the Clause and the *Lemon* test as intended to preserve a certain political distance between the political and religious powers. 473 U.S. at 382.

Justice Brennan continued that mode of analysis throughout his opinion. Thus, later in its opinion the Court observed that:

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. [citations omitted]

473 U.S. at 389.

In short, the *Lemon* test is not an inflexible rule which operates in isolation from social and political realities. Rather it is a device for screening those practices which are likely to bring about church-state relations of the kind which are harmful to religious liberty and those that are not. *Grand Rapids City School District, supra,* 473 U.S. at 383, citing, *Meek* v. *Pittenger,* 421 U.S. 349 (1975).

Where a form of governmental assistance creates no structural links of the kind the Constitution proscribes, the Establishment Clause is not violated merely because the state provides an incidental, episodic benefit to religion. To take the simplest example, the provision of routine police and fire services to religious institutions does

not implicate the Establishment Clause because it does not imply any special, structured relationship between church and state. *Everson* v. *Board of Education*, 330 U.S. 1, 17-18 (1947).

Likewise, when religious speakers take advantage of a traditional public forum to speak, they create no organic ties between their message and the state. *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Fowler* v. *R.I.*, 345 U.S. 67 (1953); *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979). The Establishment Clause does not restrict that access, because there is no institutional relationship between government and speaker.

When the Establishment Clause is seen in this light, the child benefit theory enunciated in cases such as *Everson* v. *Bd. of Educ.*, 330 U.S. 1 (1947) and *Board of Educ.* v. *Allen*, 392 U.S. 236 (1968), is

not an aberration or merely an unprincipled bending of principle in the face of sympathetic claims, but a judgment that aid to the child does not create the structured relationship between religion and government which the Framers believed threatened religious liberty.

One can disagree with the decision to classify one or the other benefit as a child benefit and not a benefit to the institution. Likewise, the child benefit principle must be limited by other Establishment Clause values, including a history which demonstrates an intent to forbid government to subsidize religious education. Still, within a carefully circumscribed compass, the principle is sound and well grounded in constitutional theory.

However, where government shoulders a substantial part of the financial burden

of carrying on the function of religious institutions, or where it yields political powers to religious institutions, even in attenuated form, *Larkin* v. *Grendel's Den*, *supra*, or where it endorses and propagates a religious point of view, *Edwards* v. *Aguillard*, *supra*, it creates a symbiotic relationship between itself and the church -- which is precisely what the Establishment Clause prohibits.

It is for the reasons that this Court has not permitted the state to pay the salaries of teachers of secular subjects in the parochial schools, *Lemon* v. *Kurtzman*, *supra*, or even to subsidize or rebate that part of religious school tuition allocated to the secular aspects of parochial school education, or provide remedial or supplementary educational programs within the sectarian schools, or

teach religious theories of origins in the public schools.[4]

In each of these cases the state either assumed part of the responsibility for the operation of the parochial schools or itself undertook the role of religious instructor. In each of these cases, the government was locked into a permanent, close and mutually sustaining relationship with religion.

It is not necessary to defend or critique every line the Court has drawn in this area in order to clearly discern the pattern which emerges from this Court's decisions. Suffice it so say that the crucial factor in that pattern -- that of a symbiotic relationship between church

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4. *See, PEARL* v. *Nyquist*, 413 U.S. 756 (1973); *Aguilar* v. *Felton*, 473 U.S. 402 (1985); *Grand Rapids City School District* v. *Ball*, 473 U.S. 373 (1985); *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Edwards* v. *Aguillard*, 482 U.S. 378 (1987).

and state where power, authority and expenses are shared in a systematic way -- would be wholly lacking were the Catalina School District to provide Zobrest a sign language interpreter.

III. A DETAILED ANALYSIS UNDER THE THREE-PART TEST CONFIRMS THE PERMISSIBILITY OF PROVIDING ZOBREST AN INTERPRETER

In order to pass muster under the familiar three-part test of *Lemon*, a practice must have a secular purpose, a predominately secular effect, and not unduly entangle government with religion. The latter branch of the test has two subparts: it inquires whether a practice engenders ongoing, repetitive, controversies over direct appropriations and whether the practice will necessitate

ongoing governmental supervision of religious institutions.[5]

In Justice O'Connor's concurrence in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and later adopted by a majority of the Court in *County of Allegheny*, *supra*, 109 S.Ct. at 3102, the *Lemon* standard has been explained slightly differently. Under this formulation, the *Lemon* inquiry focusses on the question of governmental endorsement of religion:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer

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5. Use of the three-part test does not require a *de novo* inquiry in every case. Courts may decide cases on the basis of other earlier cases applying the test. This case presents such an opportunity, as will be clear in our subsequent discussion of *Witters* v. *Washington*, 474 U.S. 481 (1986).

> to either question should render the challenged practice invalid.

465 U.S. at 690.

Both as formulated originally in *Lemon* and more recently recast in *County of Allegheny, supra*, application of the three-part test in this case demonstrates that providing Zobrest a sign language interpreter does not violate the Establishment Clause.

A. The Aid Has A Secular Purpose

The court below found that providing Zobrest with a sign language interpreter satisfies the secular purpose test, citing *Mueller* v. *Allen*, 463 U.S. 388 (1983). Respondents apparently do not challenge this holding.

This is plainly correct. This Court has never invalidated even a direct program of aid to parochial schools on grounds that it lacked a secular purpose.

Grand Rapids City School District v. *Ball*, *supra*, 473 U.S. at 383. *Cf. Bowen* v. *Kendrick*, 487 U.S. 589, 602-604 (1988). And surely the reasonable person of Justice O'Connor's formulation would not see in the provision of a sign language interpreter any suggestion that a handicapped child enjoyed preferred civic status in benefitting from the same specialized services for the handicapped in a parochial school that would be available in a public school.

B. Providing a Sign Language Interpreter Has A Primary Effect That is Secular

"As usual in Establishment Clause cases . . . the more difficult question is whether the primary effect of the challenged statute is impermissible." *Bowen* v. *Kendrick*, 487 U.S. at 604. In this case, it was this branch of the test upon which Zobrest's challenge to the

School Board's refusal to provide him with an interpreter foundered. The Court of Appeals' focussed specifically on two aspects of the effects inquiry, neither of which supports the judgment below.

1. Presence on Parochial School Premises

Relying most heavily on *Aguilar* and *Grand Rapids*, the Court found that the ongoing presence of the interpreter, a public employee, on parochial school premises was constitutionally suspect. That presence, the Ninth Circuit held, would create the appearance of a joint enterprise between the parochial school and the respondent.

It is true that in cases like *Grand Rapids*, *supra*, *Meek* v. *Pittenger*, *supra* and *Aguilar* v. *Felton*, *supra*, this Court laid heavy stress on the fact that the publicly provided services would be

provided on school premises. But that geographic fact standing alone was not determinative without regard to the nature of the services provided by government.

There are limited services which can be constitutionally provided on parochial school premises, such as health services and certain diagnostic testing. *Meek* v. *Pittenger*, *supra*, 421 U.S. at 371, n.21, 364, 368, n.17; and *Wolman* v. *Walter*, *supra*, 433 U.S. at 241-44. Similarly, government financed school lunch programs take place on parochial school premises, 42 U.S.C. § 1751, *et seq.*,[6] and no one has thought these programs unconstitutional.

A review of *Grand Rapids*, *Meek* and *Aguilar* indicates that the fact of location was a necessary, but not sufficient, ground for decision. In all

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6. In particular, *see* 42 U.S.C. § 1760(d)(3)(A).

of these cases, the fear was that the presence of public school personnel on school grounds would lead the teacher or counselor to tailor what was taught to avoid conflict with the school, or, because of the educational nature of the services, would suggest to students that the public and parochial school personnel had joined together to provide them with an education.

Moreover, the central mission of a parochial school is sectarian education. Teachers are the vehicles for carrying out that mission. It was the broad discretion teachers and counselors enjoy in selecting how and what to teach which made the location to such a significant factor, for it was thought likely to impermissibly influence those choices.

A sign language interpreter is duty-bound to translate as literally as

possible. There is no discretion to choose materials or manner of presentation. What is demanded of an interpreter is a translation which is as close as possible to what is said orally by others or by Zobrest. There is as little room as humanly possible for discretionary action by the interpreter.

Society places no premium on the exercise of discretion by interpreters, which is the opposite of the case with teachers. Presence on parochial school premises is not likely to influence what the interpreter does as it was in *Grand Rapids* and *Aguilar*. The counselors and therapists at issue in *Meek* and *Wolman*, controlled what was said in the course of

remediation; Zobrest's interpreter merely reports or transmits it.[7]

In any event, even if the presence of a public employee is particularly problematic because it creates a symbolic union of government and religion, the Respondent could simply have allowed the Zobrests to hire an interpreter and reimburse them for those costs. The use of private providers is authorized under the Individuals With Disabilities Act, *School Committee of the Town of Burlington* v. *Department of Education*, 471 U.S. 359 (1985), and in this case would have permitted the School District to comply both with its understanding of the

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7. A factor of some relevance in *Meek* and *Wolman* was the possibility that educational material would be diverted to sectarian users. That possibility is not present here. The interpreter's duties are circumscribed and not susceptible to conversion to constitutionally suspect tasks.

Establishment Clause and its duties under the Individuals With Disabilities Act.

2. Translation of Religious Subject Matter

The second basis for a finding of impermissible sectarian effect was that in fact the interpreter would be translating subject matter which was religious, whether in terms of required religious services or religious material injected into otherwise secular classes. In the lower court's view, this fact easily distinguished this case from *Meek*, *Wolman* and *Allen*, in all of which the Court upheld the provision of only secular diagnostic services and textbooks, not religious ones. *Compare*, *PEARL* v. *Regan*, 444 U.S. 646 (1980) (discussing constitutionality of reimbursement for administering and grading standardized tests) with *Levitt* v. *PEARL*, 413 U.S. 472

(1973) (same). For several reasons, it is not ultimately persuasive in this case.

Initially, the Court of Appeals relied heavily on *Meek* v. *Pittenger* as authority for the proposition that the translation of religious material was impermissible. In that case, this Court noted that it was not, contrary to Chief Justice Burger's suggestion, passing on the "question [of] whether 'the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society, and at the same time to deny those benefits to other children only because they attend . . . a church sponsored school.'" 421 U.S. at 368, n.17, citing the separate opinion of Chief Justice Burger, *id*. at 386. This case

presents that very question; surely *Meek* cannot be said to have decided a question it reserved in terms which suggest an answer different than the one reached by the Court below.

Moreover, the argument of the Court of Appeals proves too much. No one has ever doubted that the state could supply Zobrest with hearing aids or pay for surgery to restore his hearing (if such surgery were possible) and could do either of these knowing that Zobrest would go to church or attend religious school.

Even Justice Marshall, who was as strict a separationist as has ever graced this Court, acknowledged that general welfare programs such as these are permissible even though they enable beneficiaries to participate more fully in religious activities, *Wolman* v. *Walter*, *supra*, 453 U.S. at 259 (dissenting

opinion). While it is certainly relevant in weighing the constitutionality of providing Zobrest an interpreter that the program is provided in a parochial school, that is an insufficient basis on which to deny him services which are designed to allow him to "derive[] the benefit normally anticipated from the education required to become a productive member of society."[8]

B. *Witters* is Controlling Here

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8. It is important to emphasize the carefully limited nature of a decision authorizing aid to Zobrest. What Zobrest seeks is narrower than the aid that would be provided under a "voucher" or "choice" program paying for general tuition at a parochial high school. A case involving such a program would raise troubling and complex questions not present here, given the subsidization of general costs of religious institutions, the more systematic nature of the aid provided, the enhanced benefits furnished to private schools and their students, and the need to scrutinize the symbolic and other effects of government aid to religion at the elementary and secondary level even more carefully than in cases involving higher education. *See Tilton* v. *Richardson*, 403 U.S. 672 (1971). In this case, however, the effect of providing aid to Zobrest should properly be categorized as predominantly secular in nature.

A comparison of the facts in *Witters* v. *Washington*, 474 U.S. 481 (1986), where the Court rejected a state's contention that an aid to the handicapped program could not be extended to circumstances analogous to those presented here, with the circumstances presented in *Aguilar* v. *Felton*, 473 U.S. 402 (1985) and *Grand Rapids City School District* v. *Ball*, 473 U.S. 373 (1985) demonstrates why this case falls on the *Witters* side of the constitutional effects line.

In *Witters*, the state provided financial assistance to the blind to purchase vocational training. At least as far as appeared on the record, Witters, who was blind, decided of his own volition to attend a theological seminary and applied for state aid under the vocational training program. The state refused to approve his choice because of the

Establishment Clause. This Court unanimously reversed.[9]

In his opinion for the Court, Justice Marshall emphasized that allowing the payments to go to the theological seminary was not a sophisticated way of channeling state aid to a religious institution. Only small numbers of persons were able to take advantage of the vocational program, and then only if the handicapped individual decided on his or her own to use the benefit at a theological institution. Whatever support flowed from the state to the institution were episodic, idiosyncratic and unpredictable,

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9. Several Justices, relying heavily on *Mueller* v. *Allen*, 463 U.S. 388 (1983), would have upheld grants to Witters on an even broader theory. Because this case is so easily decided in favor of Zobrest on even the narrower theory adopted by Justice Marshall, it is unnecessary to address the broader theory.

and not the product of any policy decision by the state.

Washington's program could not reasonably be categorized as "one of those ingenious plans for channeling state aid to sectarian institutions." 474 U.S. at 488.[10] No institution could budget that aid as a regular part of its income, or count on the state for any portion of its budget in any given year. Nor could it assume that the state would regularly channel blind students to it. In short, there was no ongoing, steady and predictable relationship between church and state which would offend the Establishment Clause.

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10. By contrast, when the obvious purpose and effect of a government aid program is to channel aid to sectarian institutions, it should be struck as violative of the Establishment Clause. Such a program is particularly problematic at the primary and secondary school level. *Compare, e.g., Lemon* v. *Kurtzman, supra,* with *Roemer* v. *Bd. of Public Works,* 426 U.S. 736 (1976).

By contrast, in *Grand Rapids* the School District provided at public expense an extensive educational program in the city's parochial schools. The courses offered, though supplementary to an ill-defined 'core curriculum', were of the kind commonly offered by all schools. These included remedial and enrichment courses in reading, arithmetic, art, music, and other courses regularly part of the public school curriculum. In *Felton*, a local Board of Education provided remedial instruction on the premises of the parochial schools, thus relieving those schools of the burden of providing these quintessentially educational services.

The provision of these services to the parochial schools on the premises of the schools made the government an ongoing joint venturer with the religious schools.

That was the constitutional defect with the program. Religion and state need not be enemies, but they cannot enlist each other in the pursuit of common interests, nor so order their interaction so as to be partners or joint venturers, at least where the services are religious in nature. *Bowen* v. *Kendrick*, *supra*.

This case is on all fours with *Witters*. If anything, the aid here is even more attenuated from an Establishment Clause point of view than the assistance upheld in *Witters*. Here, as in *Witters*, the fact that the aid happens to relate to a religious school is pure happenstance, both statistically and in fact. Zobrest's attendance at parochial school was entirely a matter of personal choice.

The aid does not in any way underwrite the ordinary costs of operating a school. No substantial numbers of

children need this form of aid in the Catalina School District, and even fewer go to parochial schools, so that the provision of a sign language interpreter cannot be said to be a subterfuge for subsidizing parochial school education in any systematic way. Religious institutions do not receive any disproportionate share of this aid.

But these are not the only relevant distinctions. The aid in *Witters* ultimately helped pay general costs of a theological education. That is not the case here, where the aid does not pay for the substantive courses at all. Classes in the high school Zobrest attends proceed in exactly the same manner whether or not the translator is present. Education is unaffected for everyone else in the school. Zobrest is the only beneficiary of the aid

Witters permitted the state to pay the entire cost of a religious education. Here the education Zobrest is receiving is both religious and secular, and the bulk of the cost of Zobrest's education is borne not by the state, but by his parents. The state is only being asked to assume that incremental part of the cost directly attributable to Zobrest's handicap. Those costs would not exist but for Zobrest's handicap, which is not the case with Witter's tuition payments.

If the State of Washington could subsidize tuition costs to assist the handicapped learn a trade without violating the Establishment Clause or without setting a dangerous precedent for more general forms of aid to religious institutions, *a fortiori* Catalina Foothills School District can pay the

costs of a translator for Zobrest so that he can have a secondary school education.

D. Providing An Interpreter Does Not Create Undue Entanglement

The court below did not rest on the third prong of the *Lemon* test, except to dispose hypothetically of the possibility of having the interpreter present for secular courses only, as a means of ensuring a secular effect. Such a proposal might well be unconstitutional under the undue entanglement branch, but as we demonstrate in Point II.B., there is no need to limit the scope of the interpreter's activities in this way merely in order to avoid creating a sectarian effect.

What remains for government to ensure is that the translators do not embark on a self-generated religious frolic. That is fairly simply done, because the super-

vision required to ascertain that is objective -- does the translator translate accurately. It makes no difference whether the interpreter distorts religion, sociology or English literature; and whether he does so for religious or other reasons. The person supervising the translator has no concern with the content as such, but with the words used to transmit these ideas.

Not every form of government oversight of religious institutions' activities is unduly entangling because not every inquiry creates "a comprehensive, discriminatory and continuing state surveillance" such as might breach this branch of the *Lemon* test. *Lemon* v. *Kurtzman*, 403 U.S. at 619; *Aguilar* v. *Felton*, *supra*.

Routine regulatory interaction which involves no inquiries into religious

doctrines are not unduly entangling. *Hernandez* v. *CIR*, 490 U.S. 680, (1989) (routine IRS accounting inquiries into the cost of providing services in exchange for payments to a § 501(C)(3) organization was not unduly entangling.)[11] Where the inquiry is routine, almost mathematical, the undue entanglement test is not violated. *PEARL* v. *Regan*, 444 U.S. 646 (1980). The oversight here involves words, not numbers, and is therefore marginally less precise than the audits considered in *PEARL* v. *Regan*, *supra*. Still, the inquiry does not require a government official to pass on religious truths or to make constant and shapeless

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11. Accord, *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 305-06 (1985) (required recordkeeping under the Fair Labor Statistics Act not unduly entangling); *Jimmy Swaggert Ministries* v. *Bd. of Equalization of California*; 493 U.S. 378 (1990) (required sales tax records not unduly entangling).

value judgments about the activities of religious institutions. It is, therefore not unduly entangling.

E. Providing a Translator Will Not Create Controversy Along Religious Lines

To the extent that there is anything left of the political divisiveness branch of the test after *Mueller* v. *Allen supra*, 463 U.S. at 403, n.11; *Bowen* v. *Kendrick*, *supra*, 487 U.S. at 616, it is applicable only to direct financial subsidies of parochial schools. *Id.* These are not involved here, and hence this branch of the test is no impediment to the assistance Zobrest is otherwise entitled to receive.

But even if the test were now construed as broadly as when it was first laid down in *Lemon* v. *Kurtzman*, 403 U.S. at 622-25, it is unlikely that occasionally paying for a sign language

interpreter in a parochial school would generate controversy along political lines. The expenditure would not be a separate one for parochial school education.

Moreover, it is unrealistic to think that there would be any choosing up of sides along religious lines over a payment so clearly tied to assisting the handicapped. Perhaps some uniquely sensitive individual might find the assistance divisive along religious lines, but no reasonable person would see in this aid a suggestion of governmental preference for religion.

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully Submitted,

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